(31)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 246

JACK TOBIN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition and Brief

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The Scheffer Press, Inc. DEL. 7171

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Petition and Brief

To the Honorable the Judges of the Supreme Court of the United States:

Petitioner, Jack Tobin, respectfully shows to the Court as follows:

That he is a resident of the county of Cook and state of Illinois and is a citizen of the United States, native born.

That on February 13, 1945, he was sentenced by the District court of the United States for the Northern District of Illinois, Eastern Division, upon a judgment of conviction to imprisonment for a term of one year, and to pay to the United States of America a fine of $1,374 and costs, upon an information charging the use of gasoline ration coupons in violation of the provisions of section 2.5 of General Ration Order No. 8.

That on appeal from said judgment of the District Court, the Circuit Court of Appeals for the Seventh Circuit on May 21, 1945, affirmed said judgment.

That on June 15, 1945, the said Circuit Court of Appeals denied a petition for rehearing filed in said cause.

Summary Statement of Matter Involved.

On September 26, 1944, this action was commenced by the filing in the clerk's office of the said District Court of Northern Illinois, Eastern Division, a criminal information charging the dependent with violation of the provisions of General Ration Order No. 8, as amended, issued by the Price Administrator, providing against possession or transfer of forged or counterfeit ration coupons.

The information contained two counts. The first count charges knowing, wilful and unlawful possession and control, and the second count charges the knowing, wilful and unlawful transfer of certain gasoline coupons alleged to have been counterfeit and forged.

The defendant pleaded not guilty, waived a jury trial, and was tried by the court.

Motions for finding of not guilty at the close of the government's case, and again at the close of all evidence, were made and denied, and exceptions preserved.

The court found the defendant guilty and on February 13, 1945, sentenced the defendant to the custody of the attorney general for one year and to pay a fine of $1374 with costs.

The Circuit Court of Appeals affirmed the judgment on May 21, 1945, and denied a petition for rehearing on June 15, 1945.

The Information.

Paragraphs 2 to 6 of Count 1—adopted in Count 2 as part thereof—traces the authority for General Ration Order No. 8 from Congress through certain directives and orders to the Price Administrator and sets out in substance as follows:

(2) Count One informs the court that pursuant to powers vested in the President by the Second War Powers Act (56 Stat. 176) he delegated certain powers to the War Production Board by Executive Order 9125 (7 F. R. 2719) with authority to the WPB to redelegate such powers to the Office of Price Administration and that pursuant to such power, the War Production Board issued Supplementary Directive 1Q (7 F.R. 9121) giving the Office of Price Administration authority to control the sale, transfer and delivery or disposition of gasoline by any person to a consumer, or other than a consumer, to the extent allowed by coupons, certificates or such other evidence as the Office of Price Administration may prescribe as a condition to such sale, transfer, delivery or disposition;

(3) That the Price Administrator pursuant to such authority issued Ration Order No. 5C (7 F.R. 9135) which was subsequently amended (7 F.R. 9787) which established a rationing system and provided that the right of any one to acquire and use gasoline was subject thereto and that

upon proper application to the Local War Price and Rationing Board where applicant resides, gasoline mileage ration coupons would be issued to evidence a right to purchase and receive the quantity of gas prescribed by the coupons:

(4) That pursuant to such authority and as part of the administration of such rationing systems the Price Administrator issued General Ration Order No. 8 (8 F.R. 3783) as amended (8 F.R. 9626) and (9 F.R. 1325).

(5) That section 2.6 of General Ration Order No. 8 as amended provides:

> "No person shall acquire, use, permit the use of, possess or control, a ration document, except the person or the agent of the person to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order."

(6) That Section 2.5 of General Ration Order No. 8 as amended provides:

> "No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of Section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged."

Count One then charges that on or about June 19, 1944 the defendant at Chicago, Illinois in said District, knowingly, wilfully and unlawfully had possession and control of 600 A-11 Unit gasoline ration coupons not legally acquired by him personally or as agent of another in accordance with Ration Order No. 5C, or any other ration order issued by the Price Administrator of the Office of Price

Administration, a governmental agenty, which said 600 gasoline ration coupons were forged and counterfeited, being in the resemblance and similitude of true gasoline ration coupons in form as follows:

"Mileage
A
Ration f
11"

and that defendant, when he had possession and control of said coupons, well knew that they were not legally acquired by him personally or as agent of another from the Office of Price Administrator or held by him under authority of Office of Price Administration Ration Order No. 5C or any other ration order in violation of Section 2.5 of General Ration Order No. 8 of the Office of Price Administration and the second war powers Act of 1942, against the peace and dignity of the United States and contrary to the form of the Statute in such case made and provided.

COUNT TWO.

Count 2 adopts the general allegations of Count 1, (paragraphs 2 to 6), as to the force and effect of General Ration Order No. 8 as amended, and informs the Court that defendant on or about June 19, 1944, at Chicago, Illinois, did knowingly, wilfully and unlawfully transfer to the Standard Oil Company of Indiana 458 gasoline ration coupons of the "A-11" unit which were not legally transferred by him in accordane with Ration Order No. 5C or any other ration order issued by the Price Administrator of the Office of Price Administration, which said gasoline ration coupons of the "A-11" Unit purporting to be issued by the Office of Price Administration, a governmental

agency, were forged and counterfeited, and that defendant at the time of the transfer well knew they were transferred in a way and for a purpose not authorized by the Office of Price Administration Ration Order No. 5C or any other ration order, in violation of Section 2.5 of General Ration Order No. 8 of the Office of Price Administration and the Second War Powers Act of 1942.

Against the peace and dignity of the United States and contrary to the Statute provided.

Summary Statement of Facts.

The defendant Jack Tobin had operated a gasoline filling station at Archer and Western Avenues in Chicago for a period of about eight years and was the sole owner of the business which was operated under the business name of John L. Tobin Service Station.

On June 24, 1944 Tobin was called to the headquarters of the Secret Service of the United States Treasury Department and questioned as to certain gasoline coupons which were there shown to him and identified at the trial as Government Exhibits 3, 4, 5 and 6.

Government Exhibits 3, 4, 5 and 6 were four sheets of gummed O.P.A. forms R. 120 on each of which were stuck 50 gas ration coupons in squares set off for such purpose. These forms with coupons attached had originated at Tobins filling station and had been delivered to the truck driver of the Standard Oil Company in exchange for gasoline of an equivalent number of gallons.

Tobin was then taken before Commissioner Walker, where he was arraigned upon a charge of illegal possession and transfer of gasoline coupons, pleaded not guilty, and was released on bond.

Subsequently, the information rerein was filed and came on for trial before Judge John P. Barnes without a jury.

The Evidence Produced On Trial.

All of the evidence produced upon the trial against defendant was documentary except an alleged statement against interest.

There was no substantive proof made by the government that defendant had possession with knowledge, or transferred with knowledge that the coupons were forged or counterfeit, or ever had such knowledge.

The government produced in evidence a group of exhibits to show the gasoline and coupon transactions between Tobin and the Standard Oil Company, as follows:

(1) Duplicate sales slips showing the receipt of gasoline by Tobin (Ex. 1, 2, 7 and 16A).

(2) O.P.A. forms R-541 showing a summary of ration currency or coupons turned in for the gasoline signed for by Tobin on the duplicate sales slips (Ex. 1A, 2A, 7A, 8A, and 16B).

(3) O.P.A. gummed forms No. R-120 turned in by Tobin to the oil company for gasoline purchased as shown on the duplicate sales slips, on each of which forms are stuck in appropriate squares 50 coupons (Exhibits 3, 4, 5, 6, 9, and 10 to 21 inclusive).

The various exhibits were identified as originating at Tobin's filling station.

The government proved by one David Ahrens, an expert, that a portion of the gasoline coupons were counterfeited or forged. The forged coupons were not identified or pointed out.

The government then introduced as witnesses two treasury secret service men who testified to a conversation held with defendant on the morning of June 24, 1944, in which it is said Tobin made certain admissions against interest.

Samuel T. Goldman testified that he and another secret service man, Schaetzel, phoned to Tobin to come in to give bond on a charge before the United States Commissioner; that Tobin came in to the office and they showed him four sheets containing 11-A gasoline coupons, being Exhibits 3, 4, 5, and 6, on the back of which Goldman, the witness, had put his initials for identification, and that defendant stated that he had turned in those exhibits to Standard Oil Company for gasoline purchased by him for his station; and that these coupons were part of a purchase of 2000 gallons of A-11 mileage ration coupons that he had bought from his brother-in-law, Benjamin Workman, in the early part of June, 1914, and that he paid Workman eight cents a gallon for those coupons.

Harry Schaetzel, the other secret service man, testified that Tobin told them that the coupons they showed to him were a part of 2000 gallons of coupons he had purchased from his brother-in-law about June 1, 1944 and that those coupons were turned in to the Standard Oil Company for gasoline for his filling station; that he had paid 6 or 8 cents a gallon for the coupons; that Goldman was present at the time of the statement.

The defendant testified in his own behalf that his business is that of operating a gasoline filling station located at Archer and Western Avenue in Chicago, which he has operated for the past eight years. He stated that on the morning of June 24, 1944 he received a telephone call telling him to come to a certain room in the new Post Office Building and that he went down there in his working clothes and there met Samuel T. Goldman and another

agent of the secret service; that he was then taken before Commissioner Walker in the Old Post Office Building where he was arraigned on a charge of illegal possession and transfer of gasoline ration coupons, pleaded not guilty, gave bond, and was released, all within an hour after he had arrived at the secret service offices in the New Post Office Building.

Tobin testified that the agents told him that one Benjamin Workman had said that he, Workman, had sold 2000 gallons of gasoline coupons to him; that he did not tell agent Goldman that he had purchased any gasoline coupons from Benjamin Workman and denied to them that he had purchased any gasoline coupons from Benjamin Workman and denied that he had said that he had any counterfeit coupons.

Tobin testified that the only coupons that he had were those turned in to him by customers in the ordinary course of business and denied that he had purchased or obtained any gasoline coupons from Benjamin Workman.

Tobin admitted that his signature appeared on Exhibits 2A, 7A and 16B which were the summaries of ration coupons turned in for gasoline; that he made the purchases of gasoline indicated by Exhibits 2, 7, 8 and 16A; that all of the forms R-120 on which coupons were pasted were turned in by his station to the Standard Oil Company.

Tobin testified that he did not know whether the individual gasoline coupons pasted on to the O.P.A. forms R-120 were the same coupons put on by him and delivered to the Standard Oil drivers, because he had not seen the sheets since he turned them over to the truck driver; but he admitted that the signatures on Exhibits 1A, 2A, 7A, 8A and 16B were his and notwithstanding the information charges that the defendant,

> "did then and there, knowingly, wilfully and unlawfully have possession and control of to-wit: 660 A-11 unit gasoline ration coupons . . . not legally acquired by him, . . ."

and that such gasoline coupons

> "were and are forged and counterfeited gasoline ration coupons . . . being in the resemblance and similitude to true and genuine gasoline ration coupons of the United States . . . and that defendant when he had possession and control of said coupons well knew that said coupons were not legally acquired by him . . ."

Judgment and Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals rendered in this cause has not yet reached the Advance sheets and cannot be referred to as reported in the Federal Reporter.

The holding of the Circuit Court of Appeals is to the effect that it was not necessary to allege or prove that defendant had knowledge that the coupons in question were forged or counterfeit; notwithstanding the information is based upon section 2.5 of General Ration Order No. 8 deals with forged coupons only and which provides:

> "No person shall acquire, use, permit the use of, transfer, possess or control, any counterfeited or forged ration document under circumstances which would be in violation of Section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged."

The opinion of the Circuit Court of Appeals holds that the information did not charge that the coupons were possessed and transferred with knowledge or, or reason to believe that the coupons were counterfeited or forged; but that the charge is that forged coupons were acquired in a manner which would have made their use and possession unlawful even if they had been genuine (Tr. 30, 31).

In this holding it is contended that the erroneous basis of the opinion is that it ascribes to the coupons the character of validity, and, as valid coupons, were unlawfully obtained and from that basis the court deduces that

> "the use or possession of such coupons under such circumstances is unlawful, irrespective of any knowledge as to their spurious character" (Tr. 30).

which is an assumption that the coupons were valid, there being no proof that they were forged.

But a reference to the information shows that neither count charges the possession or transfer of legal or valid coupons but only of forged or counterfeit coupons; hence the deduction or conclusion of the writer of the opinion does not logically follow from the facts charge or proven.

The opinion then states

> "If defendant was charged with possession of forged coupons, knowing them to be such, . . . a violation would not depend upon the manner of their acquirement as set forth in Section 2.6" (Tr. 31).

The writer of the opinion overlooks for the moment that the coupons are all charged to have been forged or counterfeit and defendant is not charged to have knowingly, wilfully, and unlawfully had possession of, or with the transfer of, valid coupons, illegally acquired, but is charged with the possession and transfer of forged coupons not legally acquired.

Therefore valid coupons are not the subject matter of the indictment, and forged coupons illegally acquired are.

The opinion points out that

> "It is not difficult to visualize that such forged coupons might be legally acquired in the ordinary course of business" (Tr. 31).

The opinion states that the government does not claim that proof of knowledge of the forgery or counterfeiting was made but contends that proof of such knowledge was not required (Tr. 30).

The Circuit Court of Appeals overlooks that necessarily the allegation of the information that defendant knowingly possessed coupons not legally acquired that were forged and counterfeit is the same as if it were charged that defendant knowingly possessed forged coupons not legally acquired. They are but two ways of expressing the same thought and those thoughts are equal to each other, and hence equal the same thing.

It is contended that, as the record does not show from what source came the forged or counterfeit coupons, and as it was not shown that defendant had any knowledge that they were forged or counterfeit, the presumption is that the coupons came to defendant in the channels of trade. And the defendant so testified that the coupons were turned in to him by customers in due course of trade (Tr. 14).

The judgment of the Circuit Court of Appeals is therefore based upon an erroneous conception of the charges and application of the evidence thereto.

Jurisdiction.

This court has jurisdiction to review this cause under Section 240 of the Judicial Code and Section 688, Title 18, Criminal Code and criminal procedure, and Rules 11 and 12 and 13 of criminal procedure of this Court.

Questions Presented.

Is there competent and sufficient proof to support a conviction under the information?

Was it necessary for the government to prove that defendant had knowledge of the forged character of the coupons, or reason to believe that they were forged or counterfeit to sustain the charges of the information?

Was there competent and sufficient evidence before the trial court to warrant a finding of guilty beyond reasonable doubt?

Did the trial court err in entering a judgment of conviction upon this record and the circuit court of appeals err in affirming the judgment of conviction?

Reasons for the Allowance of the Writ.

I.

The decision of the Circuit Court of Appeals excuses the government from proof of an essential element of the crime charged, i. e. knowledge of the forged or counterfeited character of the ration coupons.

The Circuit Court of Appeals has here decided that the government may charge that a defendant wilfully, knowingly and unlawfully had possession of and transferred, forged gasoline ration coupons without having to prove that defendant knew that they were forged or counterfeit under Section 2.5 of General Ration Order No. 8, which deals only with forged or counterfeit coupons; and without proving the source from which the forged or counterfeit coupons came to defendant—thus basing its decision upon a supposition, or suspicion; and, contrary to principle, shifting the burden of proof to defendant.

II.

The Circuit Court of Appeals his affirmed the said judgment by holding the defendant to have been found guilty of a crime with which he is not charged.

By holding that (Tr. 30)

> "We are clearly of the opinion, however, that it was not necessary for the government to allege or prove such knowledge (of forged or counterfeit character of the coupons) under the circumstances of the instant case,"

the Circuit Court of Appeals bases its decision upon the supposition that the coupons alleged to have been unlawfully possessed and transferred were valid coupons whereas defendant was not charged with such crime.

III.

The defendant is charged with unlawfully, wilfully and knowingly possessing and transferring forged coupons and convicted of possessing and transferring valid coupons.

Section 2.6 deals with valid coupons only and Section 2.5 deals with forged coupons only, and both counts of the indictment state the crime charged to be laid upon Section 2.5 dealing only with forged coupons. There is no crime created for unknowingly possessing or transferring forged or counterfeit coupons. The substance of Section 2.5 is that no one shall knowingly use forged coupons as if genuine, for unless the coupons are known to be forged they are, in legal effect, valid.

IV.

The constitution provides that in all criminal prosecutions the defendant shall be informed of the nature and cause of the accusation, and, when so informed, he should not be tried for a different offense or have his sentence affirmed on a different charge than that on which tried.

V.

It is the duty of the courts affirmatively to protect an accused in his right to a trial upon the charge in the information, and to protect the accused in his right to a trial according to the law of the land.

It is respectfully suggested that the information charges a crime of handling forged coupons in a business transaction and there being no proof made that defendant knew that the coupons were forged the Circuit Court of Appeals has by its decision excused the government from such proof and hence has affirmed the judgment upon the theory that the coupons were valid, i.e. that it made no difference whether valid or forged, an error obvious upon the face of the record.

Specification of Errors.

The trial court erred in not directing a verdict of not guilty at the close of the government's case and again at the close of all the evidence.

The Circuit Court of Appeals erred in affirming the said judgment.

Prayer of Petition.

Wherefore it is respectfully requested that this petition for a writ of certiorari be allowed and granted to review the said judgment of the Circuit Court of Appeals for the Seventh Circuit to the end that said judgment may be reversed and so your petitioner prays.

Respectfully submitted,

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BRIEF.

The Opinion Below.

The opinion of the Circuit Court of Appeals rendered in this cause is found in the Transcript at pages 28 to 31. It has not so far been published in the Federal Reporter.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code and Section 638 of Title 18, Judicial Code and procedure, and Rules 11, 12 and 13 of criminal procedure of this court.

Date Judgment Became Final.

The order of the Circuit Court of Appeals became final on June 15, 1945, on which date it denied the petition for rehearing (Tr. 33).

ARGUMENT.

I.

The information charges that defendant knowingly had possession and control of, and knowingly transferred, certain illegally acquired gasoline ration coupons that were forged or counterfeited, in violation of Section 2.5 of General Ration Order No. 8, which section deals only with forged or counterfeited ration coupons.

There are two theories arising upon this information which deals with counterfeit or forged gasoline coupons only.

By way of elimination, let us say there is no allegation or question of the illegal use of valid gasoline coupons in the case. Forged or counterfeit coupons only are involved in the charges.

The government contends that its information is so worded and phrased that, while it charges that the coupons in question were forged or counterfeited, and that defendant knowingly and unlawfully possessed and transferred them, the government did not have to prove that defendant had any knowledge of the spurious nature of the coupons. The Circuit Court of Appeals adopted that theory.

The defendant contends that if the information is to be so interpreted, then it does not allege that the possession and transfer of the forged or counterfeited coupons was so interpreted that it does not allege that the possession is *charged*.

If on the other hand the information is to be construed to charge that defendant knowingly possessed and transferred forged or counterfeited coupons then it is admitted no proof was made by the government of such knowledge —and no crime was *proven.*

It stands admitted that the record does not show that defendant had any knowledge of the forged or counterfeit nature of the ration coupons in question. The Circuit Court of Appeals says that "the government does not claim that such proof was made, but claims that proof of knowledge is not required" (Tr. 30).

A close inspection of the two sections 2.5 and 2.6 of General Ration Order No. 8 as set out in the indictment shows that Section 2.6 deals only with *valid coupons originating from authority.* It has no reference whatever to forged or counterfeited coupons that may get into the channels of trade; it says that no one shall obtain a ration coupon except by a ration order and no one shall use one except in a way or for a purpose permitted by a ration order, but all those references are to valid orders. So, there being no valid coupons in question here section 2.6 is not here involved or controlling.

Section 2.5 provides against the possession or use of forged or counterfeit coupons in a manner that would violate Section 2.6 if they were genuine. The legal effect of that reference is to make it a crime to knowingly use forged or counterfeit coupons in the same manner and for the same purpose as valid coupons. Such provision presupposes knowledge of the forgery or counterfeiting.

It is not claimed that the forged coupons were used in any manner so that such use would violate Section 2.6, were the coupons genuine, so the first part of Section 2.6 is not here in question as is supposed by the opinion. The

forged coupons were turned in for an equivalent amount of gasoline; so, had the coupons been valid their use would not have violated Section 2.6.

So the only part of Section 2.5 here involved is that proviso "if he knows or has reason to believe that it is counterfeited or forged."

It is obvious that it can be no crime to unknowingly take in forged or counterfeit coupons, and, without knowledge of their spurious character, pass them on in course of trade; and the opinion of the Circuit Court of Appeals so recognizes, for it says:

> "It is not difficult to visualize that such forged coupons might be legally acquired in the ordinary course of business" (Tr. 31).

Obviously Section 2.6 is so worded and phrased that its intention is that ration coupons shall flow from authorized agencies through the hands of persons to whom issued, or his agents, into the hands of persons authorized to receive them and for the purpose for which issued; so, if in that channel of trade a spurious document is in some manner substituted, and received by a person, and passed on in regular channels of trade, Section 2.6 does not control in any event; and Section 2.5 does if the spurious nature of the coupon is known when received or when transferred.

So here the coupons in question, had they been valid, were not used in an illegal way; for they were used in the ordinary way—in exchange for gasoline. The method was legal. Without guilty knowledge of the spurious character of the coupons, there was no violation of the order.

So, the allegation that defendant knowingly had possession on June 19, 1944 of 600 ration coupons that were

forged, either necessarily imports that defendant had knowledge of the spurious character of the coupons or it does not charge a crime at all, for it is not a crime, if he does not know it, to possess forged coupons.

Of course it is superfluous to allege that forged coupons were not received under ration orders for forged or counterfeit coupons cannot be obtained from headquarters; so Section 2.6 is not involved. And where it is found that forged coupons are flowing in the channels of trade it is necessary to allege and prove knowledge of their character for that very reason.

It is the same as innocently possessing or passing a forged dollar bill that no one looks at when received, and pays out as casually. It is guilty knowledge of the forgery that makes the crime under Section 2.5. Guilty knowledge is the crime and that must be proven.

The substance of the charge is the same as that of uttering a forged instrument. In the text of title Forgery in 12 R.C.L. 140, Sec. 3, it is said:

> "Uttering a forged writing consists in offering to another a forged instrument with a knowledge of the falsity of the writing and with the intent to defraud."

Knowledge of the falsity and intent are the essentials of uttering and are the same in passing and transferring with knowledge of the spurious nature of the coupons.

Of course the mere possession of a forged coupon, innocently received, cannot be a crime. It is possession with intent to fraudulently use it that makes the violation. To charge that a defendant has possession of forged coupons without showing guilty knowledge of the forgery, or guilty attempt to use them, or receiving them with guilty knowledge, states no crime.

If that is the purport of this information, as the Circuit Court of Appeals holds, then it is bad for want of substance. And if the information charges knowledge of the forgery then there is no proof to sustain it.

Under either theory the conviction is erroneous and the motions to find defendant not guilty, as well as the motion in arrest of judgment challenges the sufficiency of the record and one or the other should have been allowed.

II.

Descriptive Allegations Are Not Surplusage.

The government should not be permitted to side step the effect of its charge that defendant knowingly possessed coupons that were forged by claiming that the allegation of the spurious nature of the coupons is so much surplusage and immaterial and need not be proven.

Defendant contends that being descriptive the allegations are not surplusage but part of the substantive charge and that the information, being based upon Section 2.5, as it says, knowledge of the forgery or reason to believe the coupons to be counterfeited or forged, is a necessary part of the proof to be made by the Government for it charges that *defendant knowingly, wilfully and unlawfully* had possession and control of 600 A-11 forged coupons, and being descriptive must be proven as alleged.

The information says that the coupons were forged and counterfeited and concludes that defendant violated Section 2.5; and we contend that if the count is predicated upon Section 2.5 knowledge is an essential element of proof; and that as the Government alleged such knowledge and does not contend that it made such proof, the information falls for want of proof.

The count says defendant *knowingly possessed coupons* not legally acquired that were *forged and counterfeited.*

It is the same as alleging that defendant *knowingly possessed forged coupons* not legally acquired. They equal each other and the same thing.

It is elemental that descriptive allegations in criminal complaints must be proven as alleged whether or not necessary. The rule is stated in the text of Corpus Juris Secundum, 43 C. J. S. 1266, Section 250:

> "An allegation, whether or not necessary, which is descriptive of the identity of that which is essential to the charge, cannot be rejected as surplusage and must be proved."

In *U. S.* v. *Goodwin,* 29 Fed. 237, the indictment placed the law in the Pension Statutes but it was not there, as the pension law had been repealed; and it was held that the allegation could not be rejected as surplusage so as to allow a conviction on applicable new law.

In *State* v. *Massie,* 47 L. R. A. (N. S.) 679, 78 S. E. (W. Va. 382, the indictment charged the obstruction of a road and passway, minutely describing how it passed through and over the defendant's lands, which description in fact pleaded a private roadway, whereas the statute covered public roads. In reversing a conviction the Court said:

> "Having charged the obstruction of a private way or road clearly the State was not entitled to prove the obstruction of a public road."

In *Mitchell* v. *Commonwealth,* 141 Va. 127 S. E. 368 it appeared that the offense intended to be prosecuted was making entries in bank books with intent, etc., but the charge as made was making entries which were false

and fraudulent, and it was held that the allegation must be proven as laid. The case digests many cases and texts.

The point we wish to make is that if the information professes to plead one crime and states another offense, or no offense at all, the language used, which charges the legal effect to be different from that which in fact may have been intended, cannot be rejected as surplusage, or as immaterial. Or if the matter claimed as surplusage is descriptive it must be proven as laid.

Here it is charged that defendant knowingly, unlawfully and willfully possessed and transferred forged and counterfeited coupons and the charge must be proven as laid.

Obviously it was not intended to make it a crime to possess or transfer forged coupons without knowledge of the forged character of the coupons. It is guilty knowledge that makes the gist of the crime under Section 2.5.

It would hardly seem to be fair that the Government should charge one with possessing and uttering forged coupons and then, before the jury, or court, have the allegation disregarded as surplusage.

Charging the possession of the forged coupons to be *knowingly, wilfully and unlawfully* is to charge knowledge of the forged character of the documents just as much as it charges the coupons were not legally acquired.

On the Government's theory, disregarding the charge that the coupons are forged or counterfeited as surplusage, would throw the prosecution under Section 2.6. But the characterization of the coupons makes it necessary to prove the allegation and necessary to prove that there was knowledge of the spurious character of the coupons. If

the fact of forgery is unknown that fact becomes immaterial.

As there was no proof that defendant had any knowledge of the forged character of the coupons, no crime was proven, for only guilty knowledge violates Section 2.5.

III.

There was no proof that defendant had knowledge of the forged character of the coupons in question, and no contention that there was any such proof.

This cause is bottomed on Section 2.5 of the regulations which deal with possession and control of counterfeit or forged coupons only; and the information alleges in substance and legal effect that

> "defendant . . . did then and there knowingly, wilfully and unlawfully have possession and control of . . . 660 'A-11' unit gasoline ration coupons . . . not legally acquired . . . that . . . were and are forged and counterfeited . . . in violation of Section 2.5. . . ."

That charge presupposes knowledge and is necessarily a charge of knowledge and the Government was therefore bound to prove beyond doubt its charge that defendant had knowingly possessed forged and counterfeited coupons.

The Government sought to trace the forged coupons from the Standard Oil Company backwards through defendant to one Workman, but no proof was made that Workman ever had any forged or counterfeit coupons or that defendant ever received from him any such character of coupons, and without proof that the forged coupons came from Workman, the presumption necessarily is that genuine coupons came from Workman, if it be assumed,

for arguments sake, that any coupons came from Workman.

The proof as to Workman being negative the Government had the burden of proving that defendant knowingly possessed and used forged or counterfeited gasoline coupons. And this the Government did not prove.

On the Government's own proof the coupons could as well have been valid, as illegal,—and defendant is not charged, at all, with having unlawful possession and control of *valid coupons*. As the coupons involved *could have been valid* there is that ambiguous condition in the evidence which creates a doubt which precludes any judgment upon the record. For where there are two inconsistent theories equally applicable, one innocent, the other criminal, there can be no conviction.

We point out that there is no substantive proof of the charge. There are two statements of two FBI agents of an admission against interest. It is not a confession of the crime charged. Even if it were a confession proof of facts to establish knowledge and intent would be necessary to a conviction.

The F.B.I. agents did not say anything about counterfeit or forged coupons which is the subject matter of the information.

There was no admission by defendant that he ever had anything to do with, or knowledge of, counterfeit or forged coupons.

The statements of the two agents are denied and they are not corroborated by any facts in the case.

The effect of the decision of the Circuit Court of Appeals is to excuse the Government from proving that

defendant is guilty beyond doubt, and to put defendant in the position of having to prove that he is not guilty, and to require the defendant to show from what source he got the forged coupons and from what source he got the genuine coupons attached to the exhibits. Thus so far it stands admitted that the government made no such proof.

Obviously the forgery was not easily detected as an expert was called to make that proof. The secret service agent in charge, who must have had some training in the matter, was able to point out only six.

There was no evidence tending to show that the forgery was so obvious that any layman would know it and must observe it on sight. So, proof of knowledge of forgery or counterfeiting could not be inferred from the fact that the coupons passed through defendant's hands.

The coupons are naturally such that no one could remember, nor identify them as individual coupons, so that the defendant was at the mercy of the circumstances. It was not incumbent upon defendant to trace the coupons. The government is the prosecuting party and had the burden of proving beyond doubt that defendant, and no one else, pasted the counterfeit coupons on the O.P.A. forms, and, if he did so, that he knowingly did so.

We therefore respectfully suggest that the government did not make that degree of proof required to remove reasonable doubt from the evidence. There was no admission or confession of the crime, and there being no proof of knowledge that the documents were forged, there was no proof of a crime. The presumption of innocence and of good character overcome all suspicions which alone the government raised in the case.

Conclusion.

It is respectfully suggested that the question here urged is substantial. It is not idle or frivolous.

It is a question, as we view it, of the conviction of defendant for a crime he did not commit.

Wherefore we further suggest that the record is such that in the exercise of the discretion reposed in this court the Writ of Certiorari prayed for be granted and the record be here reviewed.

All of which is respectfully submitted.

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